

July 15, 2009

Ms. Ronda Stegmann, Executive Director  
Joint Committee on Public Employee Retirement  
Missouri State Capitol, Room 219-A  
Jefferson City, Missouri 65101

Re: City of Springfield, Missouri, Police Officers and Firefighters Retirement System

Dear Ms. Stegmann:

The City of Springfield has been reviewing several matters related to its City-sponsored retirement plan for its commissioned police and fire department employees. The Joint Committee staff has talked with City staff recently and raised an issue about the possible application of Section 105.684, RSMo, to the Springfield police and fire plan's cost-of-living adjustment (COLA). Accordingly, with respect to the Joint Committee's duties in this area, this is to request the Joint Committee on Public Employee Retirement's response to the inquiry set out below.

The Springfield police and fire plan's COLA provision, originally enacted in 1983, grants age and service retirees a 3% annual increase in their monthly benefit, payable on their first July monthly benefit after they reach age 56 and have been a retiree for at least one year preceding the July in which the benefit would commence. The payment of the COLA is not contingent on any external economic factors, and has no maximum lifetime amount.

We understand that Article 6, Section 25 of the Missouri Constitution generally prohibits increases in retirement benefits to persons retired prior to the date of the increase, with one of the exceptions being cost-of-living increases, which are allowed, provided the retirement system paying them will "remain actuarially sound". We also note that under Section 21.562.3, RSMo, the Joint Committee can at any time request a public employee retirement system paying such cost-of-living increases to provide the Joint Committee with "satisfactory evidence of its actuarial soundness". Additionally, Section 105.684.1, RSMo, states that, "notwithstanding any law to the contrary," no public employee retirement plan within the scope of the statute:

".....shall adopt or implement any additional benefit increase, supplement, enhancement, lump sum benefit payments to participants, or cost-of-living adjustment beyond current plan provisions in effect prior to August 28, 2007, unless the plan's actuary determines that the funded ratio prior to such adoption or implementation is at least eighty percent and will not be less than seventy-five percent after such adoption or implementation."

The Springfield police and fire plan is currently at a funding ratio below eighty percent, and is projected to remain below eighty percent for the next fiscal year. Additionally, while we understand the

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Ms. Ronda Stegmann  
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mandatory nature of Section 105.684 on the Springfield plan, Section 6.8 of the Springfield City Charter prohibits the Springfield City Council from enacting any measure reducing the scope or extent of a pension benefit for a retired City employee or a vested City employee not yet retired without a popular vote of the Springfield voters. This is also a factor in any action the City may consider taking in connection with pension benefit matters.

Given this background information, this is to request the Joint Committee's recommendations concerning the City police and fire plan's legal obligations under the state constitution and statutes regarding continued payment of its COLA to retired employees under the plan. Specifically:

1. Does Article 6, Section 25, of the Missouri Constitution require a public sector retirement plan that is not actuarially sound to cease paying a preexisting COLA benefit to its plan retirees and beneficiaries?
2. Does the City police and fire retirement plan's longstanding COLA, or its annual July, 2009 increase, constitute the "adopt[ion] or implement[ion]" of an "additional benefit increase, supplement, enhancement, lump sum benefit payments to participants, or cost-of-living adjustment beyond current plan provisions in effect prior to August 28, 2007," such that its payment would be prohibited by Section 105.684.1, RSMo?
3. Is a public employee retirement plan within the scope of Section 105.684, RSMo, with a funded ratio below eighty percent not "actuarially sound," within the meaning of the state constitutional and statutory provisions cited above?
4. If a public employee retirement plan within the scope of Section 105.684, RSMo, may be actuarially sound with a funded ratio below eighty percent, at what funded ratio level would such a plan be determined to not be actuarially sound?
5. Is the requirement of actuarial soundness defined in terms of such a plan's funded ratio, or are other factors to be considered?

As the Springfield police and fire plan has a COLA benefit increase due commencing with its July, 2009, payment to its beneficiaries, which is payable at the end of July, your timely response on these matters would be appreciated.

If you have any questions or matters to discuss relative to this, or require any further information, please contact me.

Sincerely yours,

Evelyn Honea  
Deputy City Manager



**STATE OF MISSOURI  
JOINT COMMITTEE ON  
PUBLIC EMPLOYEE RETIREMENT**

STATE CAPITOL, ROOM 219-A  
JEFFERSON CITY, MO 65101  
PHONE (573) 751-1280  
FAX (573) 628-8468

July 22, 2009

Ms. Evelyn Honea  
Deputy City Manager  
City of Springfield  
840 Boonville  
Springfield, MO 65802

Dear Ms. Honea:

This correspondence is in response to your letters dated July 15, 2009 relative to the Police Officers and Firefighters Retirement System of the City of Springfield. The Joint Committee on Public Employee Retirement (JCPER) is well aware of the challenges associated with this retirement system.

Contained in the correspondence forwarded to the JCPER, the City of Springfield has inquired about many statutory and constitutional provisions. As a standard, the JCPER does not provide legal advice or opinions relative to law. The City should seek the advice of legal counsel or contact the Missouri Attorney General's office for a legal opinion on these matters.

It is important to note the JCPER certainly advocates prudence during this time of uncertainty relative to the investment markets. This concern is heightened for plans experiencing funding and contribution issues.

Please be aware the JCPER will aggressively pursue and advocate every statutory right associated with assuring the stability of Missouri's public plans, particularly in regard to plan contribution requirements.

Should City officials desire to meet with JCPER membership and discuss these issues further, please contact our staff office.

Sincerely,

Rep. Ward Franz  
Chairman

Sen. Jason Crowell  
Vice Chairman

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**STATE OF MISSOURI  
JOINT COMMITTEE ON  
PUBLIC EMPLOYEE RETIREMENT**

STATE CAPITOL, ROOM 219-A  
JEFFERSON CITY, MO 65101  
PHONE (573) 751-1280  
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January 27, 2010

Ms. Evelyn Honea  
Deputy City Manager  
City of Springfield  
840 Boonville Avenue, 4<sup>th</sup> Floor  
Springfield, MO 65802

Dear Ms. Honea:

Attached, please find, a response from the Attorney General's office associated with the 2009 request for legal opinion. As you are aware, Senator Champion forwarded an official request for an Attorney General opinion relating to Constitutional provisions and the granting of preexisting cost of living adjustments (COLA) to tier one retirees within the Springfield Police and Fire Retirement Plan.

Our office is forwarding this response on behalf of Senator Champion's office. If you have any questions or require additional information, please do not hesitate to contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronda Stegmann", with a long horizontal flourish extending to the right.

Ronda Stegmann  
Executive Director

Exhibit

**1**



ATTORNEY GENERAL OF MISSOURI

CHRIS KOSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P.O. Box 899  
(573) 751-3321

January 25, 2010

Honorable Norma Champion  
State Senator, District 30  
State Capitol, Room 320  
201 West Capitol Avenue  
Jefferson City, MO 65101

Dear Senator Champion:

Attorney General Koster has asked me to respond to your inquiry regarding whether Art. VI, § 25 of the Missouri Constitution requires a public sector retirement plan that is not actuarially sound to stop paying a preexisting cost of living adjustment benefit (COLA) to its plan retirees and beneficiaries. Although your question is phrased in general terms, we are not aware of any circumstances similar to the particular situation you describe. Thus, our response is regarding that particular situation.

In providing this response, we do not mean to suggest that we are giving you legal advice or otherwise treating you as a client of the Attorney General or any of his assistants. We merely wish to assist you in performing your official duties as a member of the Missouri General Assembly.

**Facts**

The Springfield Police and Fire Department passed an ordinance that creates classes of retirees. The first-tier class is composed of those who retired on or after August 8, 1983. These employees receive a 3% COLA every year. The second-tier class is composed of those who retired on or after June 1, 2006. These employees may receive a 3% COLA every year, but only if certain conditions are met, and never if the pension fund is actuarially determined to be less than 60% funded.

The attachment you provided shows that the actuarially determined funded ratio of the fund has steadily dropped from 77% funded in 2001, to only 48% funded in 2008.

Therefore, by its own terms, the ordinance prohibits currently paying a COLA to the second-tier employees, those who retired on or after June 1, 2006.

As to the first-tier employees—those who retired on or after August 8, 1983, but before June 1, 2006—the ordinance requires the 3% COLA to be paid. This differs from the second-tier employees, because the funded ratio of the pension fund has no effect on whether the COLA must be paid.

**Article VI, § 25 Prohibits Paying the COLA if the Pension Fund is  
Actuarially Unsound**

Article VI, § 25 of the Missouri Constitution provides as follows:

Section 25. Limitation on use of credit and grant of public funds by local governments—pensions and retirement plans for employees of certain cities and counties

No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except as provided in Article VI, Section 23(a) and except that the general assembly may authorize any county, city or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees and the surviving spouses and children of deceased officers and employees and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services and to their beneficiaries or estates; and except, also, that any county of the first class is authorized to provide for the creation and establishment of death benefits, pension and retirement plans for all its salaried employees, and the surviving spouses and minor children of such deceased employees; and except also, any county, city or political corporation or subdivision may provide for the payment of periodic cost of living increases in pension and retirement benefits paid under this section to its retired officers and employees and spouses of deceased officers and employees, provided such pension and retirement systems will remain actuarially sound.

This section generally prohibits granting of public money to individuals, but makes an exception for retirement and pension plans. This section also allows for a periodic COLA to be paid to retirees and beneficiaries. The power to pay a COLA to retirees and beneficiaries is an exception to the general rule against granting public money to any private person, and this exception is only authorized if the retirement or pension system "will remain actuarially sound."

Therefore, by its plain terms, Art. VI, § 25 does not authorize the paying of a COLA when a public sector retirement plan will not remain actuarially sound.<sup>1</sup> Under this provision, the City of Springfield lacks authority to pay any COLA to the first-tier retirees if the retirement plan will be actuarially unsound. It is unconstitutional for the City to do so.

However, Art. VI, § 25 is not the only constitutional provision that applies to this situation. If the first-tier employees have a contractual right to the COLA, then Art. I, § 13, regarding the impairment of contracts, applies.

**Article I, § 13 Prohibits Paying the COLA If Doing So Impairs Other Retirees'  
Contractual Rights to Benefits**

Art. I, § 13, Mo. Const., prohibits certain laws regarding contractual rights. This section provides as follows:

Section 13. Ex post facto laws—impairment of contracts—  
irrevocable privileges

That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.

Under this section, if the pension rights granted by the City of Springfield's ordinance constitute a contract, the City may not unilaterally reduce those rights by refusing to pay the COLA, because to do so would constitute an impairment of the city's contractual obligation to pay it.

In *Fraternal Order of Police Lodge No. 2 v. City of St. Joseph*, 8 S.W.3d 257 (Mo.App. W.D. 1999), the city's ordinance provided for certain pension benefits, but for two years a certain practice had been adopted that artificially raised the pension amount beyond

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<sup>1</sup> The provision does not define "actuarially sound," therefore an expert opinion might be required on this matter.

the amount provided by the ordinance. When that practice was discontinued, the pensioners sued. *Id.* The court denied their claims, stating that:

The general rule is that a pension granted by public authorities is not a contractual obligation but is a gratuitous allowance, in the continuance of which the pensioner has no vested right, and that a pension is accordingly terminable at the will of the grantor, either in whole or in part. And since there is no contract on the part of the state to continue the payment of a benefit or annuity, a change in the law affecting such benefit or annuity does not impair the obligation of a contract or deprive a pensioner of property within the constitutional meaning.

Governmental employees can have no property rights in a pension fund, nor can those claiming under them have any such rights except their claims be based upon and come within the laws governing the fund. **The extent of the rights which vested in employees is governed by the controlling statute in effect at the time their rights to a pension vested, which became a part of the contract of employment as much as if its provisions were written therein.**

*Fraternal Order of Police Lodge No. 2 v. City of St. Joseph*, 8 S.W.3d 257, 265 (Mo.App. W.D. 1999), *emphasis added*. Therefore, the practice that artificially raised the pensions was a mere gratuity, but the benefits enacted by ordinance were contractual rights as to all employees who vested at the time the ordinance was in effect.

Similarly, the ordinance enacted by the City of Springfield gave first-tier retirees the right to a 3% COLA each year. This ordinance created a contractual right in all the retirees who vested under that ordinance. *See Kunzie v. City of Olivette*, 184 S.W.3d 570, 574-75 (Mo.banc 2006) (city employee's claim of being denied right to retirement benefits was not barred by sovereign immunity because it was a contractual claim); *See also State ex rel. Breshears v. Missouri State Emp. Retirement System*, 362 S.W.2d 571, 575-76 (Mo.banc 1962) (retirees under plan established by state statute had a vested contractual interest in the continuance of benefits under the law as it existed at the time they retired). To deny them this is an impairment of the obligation of contracts—they chose to work or continued to work for the Springfield Police and Fire Departments likely in part because of the benefits of the retirement plan. They may have chosen when to retire based on those benefits.



Therefore, under Art. I, § 13, Mo. Const., the City of Springfield would be prohibited from passing a law taking away the 3% annual COLA to those first-tier retirees.<sup>2</sup>

However, those who retired before or after the first-tier retirees also have a contractual right to have their benefits paid. If Springfield's ordinance granting a 3% annual COLA to a certain class of retirees impairs the obligation of contracts as to those who retired before or after that class, then the ordinance is unconstitutional. That is, the original law guaranteeing a 3% COLA to the first-tier employees may itself be unconstitutional, because it had the effect of drastically depleting the retirement fund to the point that the fund may be actuarially unsound, and perhaps no money left to pay other retirees. *See Fraternal Order of Police Lodge No. 2 v. City of St. Joseph*, 8 S.W.3d 257, 264 (Mo.App. W.D. 1999) (rights of "individual police officers who would receive the amounts of the former pension calculation method do not outweigh the rights of the public, and participating police officers, in maintaining a solvent police pension fund"); *Missouri Attorney General Opinion* 174-1968 (giving a retiree extra compensation violates Art. I, § 13, Mo. Const. because it reduces the amount of money in the pension fund available to use to pay the other retirees' benefits). The first-tier retirees' right to an increase in benefits is less material than all retirees' rights to receive any benefits whatsoever—if the fund is drained, there will be no money with which to pay either first-tier or any other retirees any benefits at all.

Accordingly, Art. I, § 13 not only prevents reducing the first-tier COLA, but it also operates to deny the COLA when that provision will impair the contract rights of all retirees. Therefore, under this constitutional provision, the ordinance giving the first-tier employees a guaranteed 3% COLA is itself a provision that impaired the obligation of contracts regarding paying the other retirees' benefits.<sup>3</sup>

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<sup>2</sup> If Art. I, § 13, and Art. VI, § 25 were in conflict, Art. VI, § 25 would likely control, because a more specific provision controls over a general provision. *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007) (in construing statutes, specific controls over general, but no construction is required where laws do not conflict). As shown below, the sections are not in conflict in the current situation.

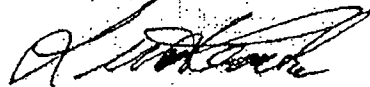
<sup>3</sup> This assumes there are no other ordinances or actions by the City of Springfield which are responsible for the decline in the funded ratio of the retirement fund. If, for example, the city had failed to perform its obligations toward the fund by not contributing its required amount to the fund each year, and if correcting that deficiency would make the fund actuarially sound, then the city might be required to make the correction and still pay the COLA.

### Conclusion

Under Art. VI, § 25, Mo. Const., it is unconstitutional for the City of Springfield to pay the 3% COLA to the first-tier retirees if doing so makes the fund actuarially unsound. The City of Springfield has a contractual obligation to pay the 3% COLA to the first-tier retirees, and if the fund were actuarially sound, then not to pay that COLA would violate Art. I, § 13. But the City of Springfield also has a contractual obligation to pay all its retirees their benefits. To the extent giving the first-tier retirees a COLA impairs the ability of the fund to pay all the employees their benefits, paying the COLA violates Art. I, § 13.<sup>4</sup> Therefore, under both Art. VI, § 25, and Art. I, § 13, the City of Springfield may not pay the 3% COLA to its first-tier retirees until the fund is actuarially sound.

Very truly yours,

CHRIS KOSTER  
Attorney General



LINDA LEMKE  
Assistant Attorney General

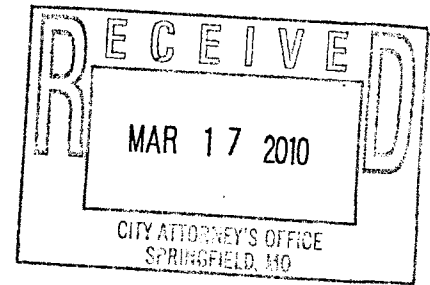
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<sup>4</sup> Accordingly, if any earlier COLAs have been paid when the fund was actuarially unsound, paying those COLAs was also unconstitutional. In that case, it may be necessary to stop paying some portion of cumulative COLAs already given, but only to the extent needed to make the fund actuarially sound. *See Maxwell v. Daviess County*, 190 S.W.3d 606, 613-14 (Mo. App. W.D. 2006) (cumulative COLAs could not be paid to an officeholder who was not entitled to them under the statute); *State ex rel. Helujon, Ltd. v. Jefferson County*, 964 S.W.2d 531, 537 (Mo. App. E.D. 1998) (injunctive relief against city ordinance would lie if ordinance was unconstitutional and enforcement of ordinance would irreparably damage a property right).



**STATE OF MISSOURI  
JOINT COMMITTEE ON  
PUBLIC EMPLOYEE RETIREMENT**

STATE CAPITOL, ROOM 219-A  
JEFFERSON CITY, MO 65101  
PHONE (573) 751-1280  
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February 9, 2010

Mr. Dan Wichmer  
City Attorney  
City of Springfield  
840 Boonville Avenue  
Springfield, MO 65802

Dear Mr. Wichmer:

Thank you for your recent inquiry to the Joint Committee on Public Employee Retirement (JCPER) concerning the January 25 Attorney General (AG) Opinion and its application. As you are aware the opinion, while not binding legal authority, concludes that "the City of Springfield may not pay the 3% COLA to its first-tier retirees until the fund is actuarially sound." Absent a definition of "actuarially sound" in both the Missouri Constitution or State Statute and as stated in the AG opinion, an actuarial or legal professional may be required for consultation on this issue.

In 2007, the Missouri General Assembly passed a legislative pension reform package with the support of the JCPER. Many issues were addressed in this package, including the prohibition of benefit enhancements for plans less than 80% funded on an actuarial basis as well as withholding provisions for plans under 60% funded while receiving deficient annual contributions. The JCPER continues to advocate the adherence to sound financial principles as it relates to Missouri's public pension plans to ensure the long-term sustainability of these plans. We recognize the steps that have been taken to address the funding issues associated with the Springfield Police and Fire Retirement Plan including the closing of the current defined benefit plan with movement of new hires to LAGERS.

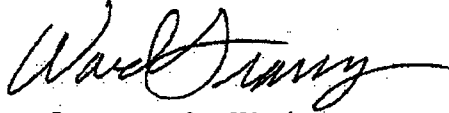
The JCPER cannot provide legal advice to the City of Springfield regarding any action associated with the awarding of a 2010 COLA for first-tier retirees within the Springfield Police and Fire Retirement Plan. However, we would like to offer the following:

- According to the plan actuarial valuation as of 06/30/09, the actuarial value of plan assets equaled \$147,197,520. This amount covers only 68% of the actuarial accrued liability associated with present value of future benefits (\$215,029,567) for retired members and does not include active member liabilities.

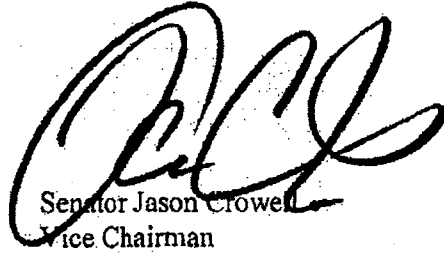
- For the most part, Missouri's teacher, state employee and local government employee retired members will not receive a COLA in 2010. These COLAs are tied to a formula as a percentage increase in the Consumer Price Index which was negative.

It is our hope that this correspondence provides information to assist the City of Springfield in its deliberations regarding the 2010 COLA award for the first-tier retirees. If you have any questions, please do not hesitate to contact the JCPER staff office.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ward Franz".

Representative Ward Franz  
Chairman

A handwritten signature in cursive script, appearing to read "Jason Crowe".

Senator Jason Crowe  
Vice Chairman

cc: JCPER members